**TAN KIM GUAN**

**v.**

**CHUAH JOO BIT**

HIGH COURT MALAYA, PENANG
GUNN CHIT TUAN J
[CIVIL APPEAL NO. 65/81]
1 JULY 1983

***LAND LAW:*** *Agreement regarding land - Whether lease for three years or more - Holding over - Effect of.*

***CIVIL PROCEDURE:*** *Appeal - Power of appellate Court reviewing decision.*

The appeal was against the decision of the Magistrate ordering the appellant to give vacant possession of a portion of a piece of land. The Magistrate had come to the conclusion that the relationship between the parties was only that of a licensor and a licensee. In his written judgment however he had stated that the lease was for more than three years and was bad in law as it had not been registered under the National Land Code 1965.

**Held:**

**[1]** The Magistrate had clearly misdirected himself. Any advantage enjoyed by him could not be sufficient to explain or justify his conclusion that the lease was for more than three years. Where the appellate Court is satisfied that the trial Judge had not taken proper advantage of his having seen and heard the witnesses, the matter then becomes at large for the appellate Court. (*Tay Kheng Khong v. Heap Moh Steamship Co. Ltd.* [1964] MLJ 87, 92 PC).

**[2]** The appellate was a tenant for a term of years holding over after the expiration of the lease and became a tenant from year to year when he paid the subsequent annual rent at the previous yearly rate. Upon a holding over and payment of rent, a tenancy on the terms of the expired lease should be inferred and such a tenant becomes a tenant from year to year. (*Morgan v. William Harrison, Limited* [1907] 2 Ch. 137, 143).

**[3]** The respondent had failed to determine the yearly tenancy created in circumstances of the case. The notice to quit which did not give the appellant at least half a year's notice to quit was bad in law. (*Right d. Flower v. Darby and Bristow* [1786] 1 Term Rep. 159, 163).

*[Appeal allowed.]*

**Cases referred to:**
*Clarke v. Edinburgh & District Tramways Co. Ltd. [1919] SC (HL) 35*
*Morgan v. William Harrison, Limited [1907] 2 Ch 137*
*Right d. Flower v. Darby and Bristow [1786] Term Rep 159*
*Tay Kheng Khong v. Heap Moh Steamship Co. Ltd. [1964] MLJ 87*

**Other source referred to:**
*Woodfall's Law of Landlord and Tenant* 28th Edn. Vol. 1 p. 255

*For the appellant - Yeap Ghim Guan; M/s. Yeap & Co.*
*For the respondent - Counsel discharged; Respondent absent.*

**JUDGMENT**

**Gunn Chit Tuan J:**

This was an appeal against the decision of the learned Magistrate, Bukit Mertajam, who had on 23 May 1979 ordered the appellant to give up vacant possession of a portion of a piece of land under Lot No. 2037, Mukim 11, Province Wellesley South (hereinafter referred to as "the said portion"). According to the appellant the said portion was at all material times uncultivated and in a state of wilderness, being a portion which is a diagonal area between two pylon lines erected by the Lembaga Letrik Negara to carry electricity. The respondent who was the owner could not plant rubber on the said portion and had permitted him to cultivate it upon payment of an annual rent equivalent to the land rent and drainage fee payable to the Government for the said portion. The actual amount paid by the appellant to the respondent was RM80 for the years 1968-69, and RM196 for years 1970-71. The appellant also stated that he was allowed to remain on the said portion for as long as he wished and had expended much money, labour and time making the said portion suitable for agricultural cultivation.

According to the respondent, however, he was persuaded by one Tan Ah Keat and agreed verbally on 1 August 1968, to lease the said portion to the appellant for a period of three years free of ground rent but he did accept from the appellant the said sums in respect of land rents and drainage rates payable to the Government for the said portion. After expiration of the three year term, he made several requests to the appellant for the return of the said portion but the appellant refused to comply with his requests and as a result he had to send him a notice in writing on 2 February 1972.

The learned Magistrate who had the benefit of seeing and hearing the witnesses in Court stated in his brief grounds of judgment that he was more inclined to believe the respondent's story. But in spite of the respondent's statement of claim in which was pleaded that he had verbally leased the said portion to the appellant for a period of three years and his evidence on oath to the same effect the learned Magistrate came to the conclusion when he delivered oral judgment on 23 May 1979 that the relationship between the parties was only that of "a licensor and a licensee'. However, when he wrote his judgment two years later on 23 May 1981, he came to the equally astounding finding and conclusion that the lease in this case was for more than three years and was bad in law as it was not registered under the National Land Code, 1965.

For the principles on which an appellate Court should act in reviewing the decision of a lower Court one can do no better than to refer to the Privy Council judgment in *Tay Kheng Khong v. Heap Moh Steamship Co. Ltd.* [1964] MLJ 87 in which case Lord Guest stated as follows:

> There is a heavy onus on a party who seeks to displace the conclusion formed by the trial Judge on questions of fact. The principles upon which an appellate Court should act in reviewing the decision of a Judge of first instance were stated by Lord Thankerton in *Watt or Thomas v. Thomas* [1947] AC 484, 487, 488 at page 487.
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> > I.Where a question of fact has been tried by a Judge without a jury, and there is no question of misdirection of himself by the Judge, an appellate Court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial Judge's conclusion;

II. The appellate Court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence;

III. The appellate Court, either because the reasons given by the trial Judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses and the matter will then become at large for the appellate Court.

Later his Lordship quoted with approval a passage from the speech of Lord Shaw in *Clarke v. Edinburgh & District Tramways Co. Ltd.* [1919] SC (HL) 35, 37:

> In my opinion, the duty of an appellate Court in those circumstances is for each Judge of it to put to himself, as I now do in this case, the question, am I - who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of the Judge who heard and tried the case - in a position, not having those privileges, to come to a clear conclusion that the Judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the Judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment.

In this case the learned Magistrate had clearly misdirected himself and I was satisfied that any advantage enjoyed by him by reason of having seen and heard the witnesses could not be sufficient to explain or justify his conclusion that the lease in this case was for more than three years. Indeed it was clear from the pleading as well as from the evidence recorded by the learned Magistrate, and as agreed to by Mr. Yeap Ghim Guan, Counsel for the appellant, that the respondent had granted the appellant a lease of the said portion for a period of three years.

It was the submission of Counsel that after the expiration of the verbal lease on 31 July, 1971 and the refusal of the appellant to quit the said portion after the said notice to quit which was served on him on 2 February 1972, there was created by his holding over a tenancy from year to year. As such the tenancy from year to year could only be determined thereafter. The one month's notice to quit in this case was therefore bad in law. Counsel referred to and relied on the following passage in *Woodfall's Law of Landlord and Tenant* Vol.1 (28th Edn.) page 255:

> **Implication from holding over by a tenant and subsequent payment of rent.**
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> Where a tenant for a term of years holds over after the expiration of his lease, he becomes a tenant on sufferance; but when he pays, or expressly agrees to pay, any subsequent rent, at the previous yearly rate, a new tenancy from year to year may thereby be created upon the same terms and conditions as those contained in the expired lease, so far as the same are applicable to and not inconsistent with a yearly tenancy. This, however, is a matter of evidence rather than of law, the question being what may fairly be inferred as the intention of the parties. In the absence of any evidence one way or the other, it seems that upon a holding over and payment of rent a tenancy on the terms of the expired lease should be inferred, even if there had been assignment of the reversion prior to the holding over.

According to the evidence recorded by the learned Magistrate, the respondent did request the appellant to return the said portion but the appellant did not do so. The respondent thereafter allowed the appellant to hold over after the expiration of the three year lease on 31 July 1971, and took no action until more than six months later when he instructed his solicitors on 2 February 1972, to issue a notice to quit (exhibit P1). That notice to quit dated 2 February 1972, required the appellant to give up vacant possession of the said portion on 31 March 1972. According to the respondent he did not accept any more rent from the

appellant after 1971. But according to the appellate he, after the said notice to quit, did pay the respondent RM196 rent through his solicitors but the respondent refused to accept it. In all the circumstances of this case, as shown by the evidence recorded by the learned Magistrate, I agreed with the learned Counsel for the appellant that as he was a tenant for a term of years holding over after the expiration of the lease, he became on 1 August 1971 and when he paid the subsequent annual rent at the previous yearly rate, a tenant from year to year. Support for this view could be found in the following *dictum* of Cozens-Hardy, MR in *Morgan v. William Harrison, Limited* [1907] 2 Ch. 137 at p. 143 in which His Lordship said as follows:

> Now there is ample authority that a tenant holding after the expiration of a lease, if he pays rent or agrees to pay rent subsequently, becomes, if no other terms are suggested a tenant from year to year - a yearly tenant; and there is ample authority that under those circumstances the tenant holding over is deemed to hold upon all the terms and conditions of the original tenancy so far as they are applicable to a yearly tenancy;

The said notice to quit (exhibit P1) which did not give the appellant at least half a year's notice to quit was therefore bad. (See *Right d. Flower v. Darby and Bristow* [1786] Term Rep 159). As the respondent did not give the appellant proper notice he has therefore failed to duly determine the yearly tenancy created in the circumstances of this case. For these reasons this appeal was accordingly allowed with costs and the said decision of the learned Magistrate Bukit Mertajam set aside.

Also found at [1984] 1 CLJ 47